# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN PARKER,

Defendant-Appellant.

UNPUBLISHED
February 12, 2008

No. 275682
Wayne Circuit Court
LC No. 06-009958-01

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 10 to 20 years each for the first-degree CSC convictions and 8 to 15 years for the second-degree CSC conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of engaging in sexual activity with his daughter, who was under the age of 13. The victim testified that the first incident occurred when she was in the sixth or seventh grade. She was playing a game with defendant and ran into the basement, where her room was located, to hide. After defendant found her, he took her into her room and touched her breasts and her genital area. Defendant touched her in a similar manner on subsequent occasions. Later, when the victim entered the seventh grade, defendant began having intercourse and oral sex with her and digitally penetrating her. The victim eventually told her mother what happened and the matter was reported to the authorities.

Vincent Palusci, a child abuse pediatrician who was qualified as an expert in his field, examined the victim, who reported "she had had sex with her father." She reported that there "was no force involved, . . . but it did involve multiple events and multiple different types of contact." A genital exam showed two tears in the hymen. Palusci could not state what caused the tears, which were not fresh, but deemed at least one to be "definitive evidence of trauma to the area."

In his first issue on appeal, defendant argues that the trial court erred in admitting certain evidence at trial. To the extent that defendant objected below on the same ground raised on appeal, the issue has been preserved, *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67

(2001); *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992), and is reviewed for an abuse of discretion, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). To the extent that defendant failed to object, the issue is not preserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first argues that the trial court erred in permitting the victim's mother to testify that the victim, who was "hysterically crying," told her "that her father had been having sex with her." Defendant did not object to this testimony below. We agree that the hearsay testimony, MRE 801(c), was not admissible as an excited utterance. MRE 803(2). The statement related to a startling event, *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988), but was not made while the victim was laboring under the stress of excitement caused by the abuse. While "a later startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously," *State v Chapin*, 118 Wash 2d 681, 686-687; 826 P2d 194 (1992), the victim did not make the statement spontaneously when seeing her father for the first time after their separation; rather, she made the statement hours later in response to questioning by her mother. Although error occurred, we cannot conclude that it affected defendant's substantial rights because the mother's testimony was cumulative to that of the victim, who was thoroughly cross-examined about her allegations. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003); *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next argues that the trial court erred in permitting the victim's mother to testify that the victim felt "dirty" and "ashamed" by what had happened. Again, defendant did not object to this testimony below. It is not clear from the record whether the victim's mother was recounting statements made by the victim, which would be hearsay if offered for the truth of the matter asserted, MRE 801(c), or if she was offering her own lay opinion regarding how the victim felt by what she had revealed, which was admissible under MRE 701. Indeed, the mother testified that the victim "seemed kind of ashamed," not that she claimed to be ashamed. Therefore, defendant has failed to show plain error in the admission of the testimony.

Defendant next argues that the trial court erred in permitting Dr. Palusci to testify that the victim reported "that she was there because essentially she had had sex with her father." Defendant did preserve this issue by objecting on the ground of hearsay. However, MRE 803(4) supports admission of the evidence as a statement made for purposes of medical treatment or diagnosis. See *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); *People v McElhaney*, 215 Mich App 269, 282-283; 545 NW2d 18 (1996). Even if the evidence was not admissible, any error is presumed to be harmless and reversal is required only if it is more probable than not that it determined the outcome of the case. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). Because the statement was cumulative to that of the victim's testimony, it did not affect the outcome of the case. *McElhaney*, *supra* at 283; *People v Meeboer*, 181 Mich App 365, 373-374; 449 NW2d 124 (1989).

Lastly, defendant contends that the trial court erred in admitting Dr. Palusci's report into evidence. We conclude that defendant waived any error because he objected only to information that came from persons other than the victim and the document was redacted to resolve that objection. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000).

In his second issue on appeal, defendant argues that he was denied a fair trial due to prosecutorial misconduct. Because defendant did not object below, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The prosecutor may argue the evidence introduced at trial and comment on reasonable inferences arising from the evidence and from "common experience" as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Ackerman, supra* at 450. The prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and "may not argue the effect of testimony that was not entered into evidence." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

The prosecutor concedes that error occurred. The prosecutor argued that defendant's conduct was typical grooming behavior used to prepare the victim for abuse even though no expert testimony had been offered regarding the behavioral characteristics of child sexual abusers. Nevertheless, reversal is not required if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005). Had defendant objected, the court could have cured the error by instructing the jury to disregard the improper remark. Further, absent an objection, a trial court's instructions that the jury is to decide the case based only on the evidence and that the attorneys' arguments are not evidence can effectively dispel any prejudice. *Bahoda, supra* at 281. The trial court so instructed the jury, and "jurors are presumed to follow their instructions." *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Therefore, appellate relief is not warranted.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra